

**OP. NO. 03-108**

**COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING.**

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (DEBT).**

**Neither Virginia Constitution nor applicable state statutes allow local governing body to adopt adequate public facilities ordinance that binds, directly or indirectly, future governing body to fund capital improvements program at specific level and authorizes approval of proposed development project to be deferred for specified number of years.**

The Honorable John C. Watkins  
Member, Senate of Virginia  
December 15, 2003

#### **Issue Presented**

You ask whether a county may adopt an adequate public facilities ordinance<sup>1</sup> that would bind, directly or indirectly, future boards of supervisors to fund a capital improvement plan ("plan") at a specific level in conjunction with the authority to defer the approval of a proposed development for a specified number of years. Such a plan would bind the present and future county board of supervisors to fund capital improvements at a specific monetary amount over the specified number of years.

#### **Response**

It is my opinion that the Constitution of Virginia and applicable state statutes currently do not allow a local board of supervisors to adopt an adequate public facilities ordinance that binds, directly or indirectly, the current or future board of supervisors to fund a capital improvements program at a specific level without submitting the matter to the qualified voters for approval pursuant to the requirements of Article VII, § 10(b) of the Virginia Constitution.

#### **Background**

As cochairman of a legislative subcommittee that is investigating legislation dealing with the authorization of counties to adopt adequate public facilities ordinances, you seek clarification regarding the legislative authority of counties that may utilize such ordinances. You advise that the subcommittee is considering several legislative models that would authorize counties to adopt adequate public facilities ordinances. These models generally provide that standards for what constitutes adequate public facilities will be established in each ordinance in each authorized county. The ordinance also would provide for the review of any proposed development projects to determine whether such standards have been met and such adequacy exists in that particular county. You relate that, typically, the models provide a mechanism whereby the county is authorized to defer approval of a proposed project, such as a subdivision plan or site plan, for some number of years<sup>2</sup> with the assurance that the county in the

interim will fund and implement a capital improvements plan to construct specific infrastructure needed to support the development when it is approved and undertaken in the future. The models to which you refer require an assurance that the county will fund and implement a capital improvements plan that is binding on the county. Such a binding monetary obligation on the county, therefore, constitutes a debt of the county.

### **Applicable Law and Discussion**

Virginia's land use and zoning enabling statutes are detailed in Chapter 22 of Title 15.2.<sup>3</sup> Chapter 22 presents a connected system for local government planning, subdivision of land, and zoning. Various provisions within Chapter 22 detail the creation, powers, and responsibilities of the several bodies and officers charged with implementing the local land use regulation process, including local planning commissions. A local planning commission is required to prepare and recommend subdivision ordinances and amendments to such ordinances to the governing body of the locality,<sup>4</sup> to prepare and recommend a comprehensive plan for development of the area, and to specify the procedures for putting the plan into effect.<sup>5</sup> In addition, the planning commission may recommend amendments to zoning ordinances;<sup>6</sup> may have made, for approval by the governing body, an official map showing existing and proposed public streets, waterways and public areas;<sup>7</sup> and may prepare a five-year capital improvement program for the locality based on the comprehensive plan.<sup>8</sup>

Under the current statutory scheme, the local governing body may direct the local planning commission to prepare and submit annually a capital outlay program,<sup>9</sup> covering "a period not to exceed the ensuing five years," which may be used as the basis for developing a plan of current capital expenditures.<sup>10</sup> The capital outlay program is reviewed annually and projects may be shifted from one year to another as the need arises.<sup>11</sup> As each fiscal year passes, another fiscal year is added to the end of the capital outlay program. Through this process of annual review, the governing body can prepare for future construction needs. It can minimize the difficulty of providing money for the locality's capital growth requirements by setting aside a portion of the costs in reserve each year. The governing body also can anticipate the impact of capital projects on the locality's requirements for operating funds. Following hand-in-hand with capital expansion are increases in debt service, costs of additional personnel, and operation and maintenance expenditures that will be reflected in subsequent annual budgets.

Therefore, under the current statutory scheme, a capital budget is simply a plan for funding capital projects and a schedule of when such projects may be expected to be completed. It includes such construction as sewer and water systems, school and office buildings, parks and recreation facilities, sanitary landfills, and other projects requiring large capital outlays. Because capital budget items are nonrecurring expenses for major projects, they have no claim to legitimacy by precedent or tradition. Therefore, review of the capital budget focuses on the entire amount of each item considered for funding.

Article VII, § 10(b) of the Virginia Constitution limits the ability of a county to contract debt and otherwise incur financial obligations. Subject to certain exceptions, § 10(b) prohibits counties from contracting debt or establishing a fixed contractual obligation to make payments in future years, unless the proposed debt is authorized by general law and approved by the qualified voters of the county in a duly authorized referendum. The limitation imposed upon county debt by § 10(b) has been applied to unconditional long-term obligations

requiring the payment of money.<sup>12</sup> Contractual provisions which purport to bind a locality to a fixed obligation to make payments in future years generally are considered to be debts subject to the constitutional restrictions of Article VII, § 10.<sup>13</sup>

The position of this Office, as stated in numerous prior opinions, is that a local governing body may not enter into any agreement which provides for payments of county funds in future years, unless the agreement first is submitted to the qualified voters of the locality for approval in a referendum authorized by general law, or the payments to be made in future years are subject to the condition that the local governing body appropriate funds during each year in which a payment is to be made.<sup>14</sup> A "debt" is described as establishing an unconditional long-term obligation to make payments in future years.<sup>15</sup> The plan that you describe obligating a present and a future board of supervisors to fund capital improvements in conjunction with deferral of the approval of a proposed development for a specified number of years clearly constitutes a debt. Subject to certain exceptions in Article VII, § 10(b), the general law authorizing such a debt must provide that the question of such a debt must be submitted by referendum to the qualified voters of the county.<sup>16</sup>

Prior opinions of this Office also consistently conclude that a local governing body currently does not have the power to take actions that irrevocably bind its successors in office, unless such binding action is expressly authorized by statute.<sup>17</sup> No legislative body, federal, state or local, may limit the power of its successors to amend or repeal statutes or ordinances absent statutory authorization.<sup>18</sup> Therefore, any adequate public facilities ordinance adopted by a board of supervisors to fund a capital improvements program at a specific level must necessarily be subject to later amendment or repeal by the governing body or its successors in office under current law.

### **Conclusion**

Accordingly, I must conclude that the Constitution of Virginia and applicable state statutes currently do not allow a local board of supervisors to adopt an adequate public facilities ordinance that binds, directly or indirectly, the current or future board of supervisors to fund a capital improvements program at a specific level without submitting the matter to the qualified voters for approval pursuant to the requirements of Article VII, § 10(b) of the Virginia Constitution.

<sup>1</sup>In a separate opinion to you, dated December 15, 2003, I conclude that under current law, the provision of public services and facilities required by a new development is one of many factors a local governing body should consider in its deliberations concerning a rezoning application. See 2003 Va. Op. Att'y Gen. No. 03-109 (Dec. 15, 2003). I also conclude that the provision of public services and facilities required by a new development may not be the sole basis for the denial or deferral of an application for rezoning. *Id.* For the purposes of this opinion, I will assume that the General Assembly proposes to grant to a county the authority to adopt as the sole basis for the denial or deferral of a rezoning application the lack of public services and facilities required by a new development. I will also assume that the General Assembly desires to grant to a county the ability to obligate current and future boards of supervisors to a specific funding level in a capital improvement plan to guarantee public services and facilities at a specific level to accommodate all new development resulting from approval of a rezoning application.

<sup>2</sup>You advise that such period of time is usually five or more years.

<sup>3</sup>Va. Code Ann. §§ 15.2-2200 to 15.2-2327 (LexisNexis Repl. Vol. 2003).

<sup>4</sup>Sections 15.2-2251, 15.2-2253.

<sup>5</sup>Sections 15.2-2223 to 15.2-2232.

<sup>6</sup>Section 15.2-2286(A)(7).

<sup>7</sup>Section 15.2-2233.

<sup>8</sup>Section 15.2-2239.

<sup>9</sup>Section 15.2-2239 refers to capital improvement programs.

<sup>10</sup>Section 15.2-2239.

<sup>11</sup>*See id.*

<sup>12</sup>*See* Fairfax-Falls Church Cmty. Servs. Bd. v. Herren, 230 Va. 390, 337 S.E.2d 741 (1985); Bd. of Supvrs. v. County Executive, 210 Va. 253, 169 S.E.2d 556 (1969); Button v. Day, 205 Va. 629, 139 S.E.2d 91 (1964).

<sup>13</sup>*See* 1984-1985 Op. Va. Att'y Gen. 95 (citing 1982-1983 Op. Va. Att'y Gen. 149).

<sup>14</sup>*See* Op. Va. Att'y Gen.: 1990 at 48, 49-50; 1987-1988 at 325, 327, 328; 1982-1983, *supra* note 13, at 150; 1974-1975 at 28, 29; 1972-1973 at 37.

<sup>15</sup>1990 Op. Va. Att'y Gen., *supra* note 14, at 49; *see, e.g., Herren*, 230 Va. at 394, 337 S.E.2d at 743-44 (holding that, to extent employment contracts between church community services board and employees extended beyond years in which they took effect, such contracts "constituted long-term obligations binding Fairfax County").

<sup>16</sup>*See* 1995 Op. Va. Att'y Gen. 44, 45.

<sup>17</sup>*See* Op. Va. Att'y Gen.: 1990 at 105, 107; 1984-1985 at 99, 101; 1974-1975 at 33; 1972-1973, *supra* note 14, at 37; 1949-1950 at 31; *cf.* Att'y Gen. Ann. Rep.: 1982-1983 at 151, 154 n.9; 1981-1982 at 48, 50.

<sup>18</sup>1A Norman J. Singer, Sutherland Statutory Construction §§ 22:2, 23:3 (West 6th ed. 2002).

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